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14

15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**

17

18 MY CHOICE SOFTWARE, LLC, a California  
19 limited liability company, individually, and on  
20 behalf of all others similarly situated,

21 Plaintiff,

22 vs.

23 SHOPIFY, INC., a Canadian Corporation;  
24 SHOPIFY (USA) INC., a Delaware  
25 Corporation; TASKUS, INC. a Delaware  
26 Corporation; and DOES 1 through 100,  
27 inclusive,

28 Defendants.

Case No. 4:23-cv-02687-DMR

29 **DEFENDANTS' SHOPIFY INC. AND**  
30 **SHOPIFY (USA) INC.'S NOTICE OF**  
31 **MOTION AND MOTION TO DISMISS**  
32 **PLAINTIFF MY CHOICE SOFTWARE,**  
33 **LLC'S COMPLAINT; MEMORANDUM OF**  
34 **POINTS AND AUTHORITIES IN SUPPORT**

35 Hearing Date: July 13, 2023

36 Hearing Time: 1:00 p.m.

37 Judge: Hon. Donna M. Ryu

38 **FILED UNDER SEAL**

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**NOTICE OF MOTION AND MOTION TO DISMISS**

TO PLAINTIFF AND ITS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on July 13, 2023, at 1:00 p.m., as soon thereafter that counsel may be heard, Defendants Shopify Inc. and Shopify (USA) Inc. (collectively, "Shopify Defendants") will and hereby do move this Court in Courtroom 4 of the United States District Court for the Northern District of California, Oakland Courthouse, located at 1301 Clay Street, Oakland, California, 94612.

The Shopify Defendants move to dismiss with prejudice MCS's claims against the Shopify Defendants in its Complaint on the following bases:

(1) issue preclusion pursuant to a May 18, 2022, order by Judge David O. Carter dismissing with prejudice MCS's claims against the Shopify Defendants in a nearly identical case styled *My Choice Software, LLC v. TaskUs, Inc.*, No. 8:22-cv-01710-DOC-DFM (C.D. Cal.);

(2) forum non conveniens due to a written forum selection clause in the parties' contract that requires that all related disputes be brought in Ontario, Canada;

(3) lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2); and

(4) failure to plead sufficient statutory standing for the Sixth and Eighth Causes of Action in the Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, the accompanying Request for Judicial Notice filed concurrently herewith, the Declaration of Allison L. Libeu (“Libeu Decl.”) and the exhibits attached thereto, the Declaration of Erin McIntomny (“McIntomny Decl.”) and the exhibits attached thereto, the Declaration of Sarah Harris-John (“Harris-John Decl.”), the Declaration of Eliot N. Kokers (“Kokers Decl.”) and the exhibits attached thereto, the complete files and records in this action, oral argument of counsel, and any matter that may be submitted at the hearing.

## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

3 On the same day in two different fora, Plaintiff My Choice Software, LLC (“MCS”) filed two  
4 nearly identical lawsuits against Defendants Shopify Inc. and Shopify (USA) Inc. (“Shopify USA,”  
5 and together, the “Shopify Defendants”). Both are based on the exact same set of alleged facts, assert  
6 overlapping claims, and seek recompense for the same alleged harms. A federal judge in MCS’s  
7 other case already dismissed *with prejudice* its claims against the Shopify Defendants, noting that  
8 MCS’s decision to file two “substantially identical” cases reeked of “gamesmanship” and that  
9 resolution of one case should necessarily resolve the other. *See My Choice Software, LLC v. TaskUs,*  
10 *Inc.*, No. 8:22-cv-01710-DOC-DFM (C.D. Cal.) (Carter, J.) (“Central District Case”). Despite this,  
11 and despite opportunities the Shopify Defendants provided MCS to withdraw its second attempted  
12 bite at the apple, MCS continues to prosecute this case, inexplicably wasting the Court’s and parties’  
13 time and resources. The Shopify Defendants respectfully urge the Court to dismiss MCS’s claims  
14 with prejudice and issue an order to show cause as to why MCS should not be sanctioned for its  
15 actions and continuing conduct.

16       MCS is a merchant that has contracted with Shopify Inc. since 2015 to provide its online  
17 storefront. In 2020, rogue criminals—outsiders conspiring with contractors of Defendant TaskUs,  
18 Inc. (“TaskUs”), which provided services to non-party Shopify International Limited—  
19 surreptitiously stole customer information from TaskUs and Shopify Inc. in the Philippines,  
20 including information relating to certain MCS customers. No one disputes that MCS and Shopify  
21 Inc. were both victims of those crimes. As soon as Shopify Inc. became aware of the data theft, it  
22 promptly notified merchants, including MCS, and began investigating the scope and impact on  
23 affected persons. In April 2021, the federal government indicted one of the bad actors for his criminal  
24 conduct, and he ultimately pleaded guilty to conspiracy to commit wire fraud.

25 On September 16, 2022, MCS filed two nearly identical lawsuits relating to this data theft in  
26 separate California courts. It is unnecessary for this Court to delve into all the fatal deficiencies in

1 MCS's complaint here (of which there are many).<sup>1</sup> Instead, the Court need only address four  
 2 dispositive issues, each of which compels dismissal of MCS's claims against the Shopify Defendants.

3 *First*, dismissal of MCS's claims in the Central District Case compels dismissal of MCS's  
 4 Complaint based on issue preclusion. In the Central District Case, the Shopify Defendants moved to  
 5 dismiss on the basis that, among other things, MCS's contract with Shopify Inc.—called the “Plus  
 6 Agreement”—contains a forum selection clause that requires that all disputes be brought in Ontario,  
 7 Canada. MCS opposed, arguing that the forum selection clause is unenforceable. Judge David O.  
 8 Carter granted the Shopify Defendants' motion to dismiss *with prejudice*. Judge Carter held that the  
 9 forum selection clause applies to MCS's claims about the 2020 data theft, finding “no extraordinary  
 10 circumstances that warrant overcoming this forum selection clause.” This case and the Central  
 11 District Case involve the same relevant parties: MCS, Shopify Inc., and Shopify USA. They also  
 12 involve the same issue: whether the forum selection clause in the parties' contract that requires  
 13 MCS's claims regarding the 2020 data theft be brought in Ontario, Canada. Because Judge Carter  
 14 already ruled on this issue, MCS “is precluded from relitigating the applicability, and enforceability,  
 15 of the forum selection clause.” *Offshore Sportswear, Inc. v. Vuarnet Int'l, B.V.*, 114 F.3d 848, 851  
 16 (9th Cir. 1997). The Court should thus dismiss MCS's claims against the Shopify Defendants based  
 17 on issue preclusion.

18 *Second*, even if issue preclusion did not apply, the Court should nevertheless dismiss MCS's  
 19 claims based on the forum selection clause in the contract between MCS and Shopify Inc. ( (McIntomny Decl., Ex. A.) In the Plus Agreement, the parties [REDACTED]

21 [REDACTED] Canada to resolve  
 22 their disputes. (*Id.* § 9.3.) As the Supreme Court instructs, forum selection clauses like the clause  
 23 here “should control except in *unusual* cases,” “*extraordinary* circumstances,” and where “public-  
 24 interest factors *overwhelmingly* disfavor a transfer.” *Atl. Marine Const. Co. v. U.S. Dist. Ct. for W.*

25  
 26 <sup>1</sup> In its rush to initiate legal action, MCS filed a complaint in this case that is rife with legal and  
 27 factual errors, including nonsensical allegations about a non-party clothing manufacturer (Compl.  
 28 ¶¶ 1, 6, 23-25 (allegations relating to “IABMFG”)) and services that no defendant provides (*id.* ¶¶ 81,  
 85, 90, 94, 156 (allegations relating to “title insurance, a home warranty, or other real estate closing  
 services”)).

1 *Dist. of Tex.*, 571 U.S. 49, 66–67 (2013) (“When parties have contracted in advance to litigate  
 2 disputes in a particular forum, courts should not unnecessarily disrupt the parties’ settled  
 3 expectations. . . . In all but the *most unusual* cases, therefore, ‘the interest of justice’ is served by  
 4 holding parties to their bargain.”) (emphases added). In its Complaint, MCS does not allege the Plus  
 5 Agreement is inapplicable or unenforceable; to the contrary, MCS asserts breach of contract claims.  
 6 (Compl. ¶¶ 79–92.) Yet, MCS fails to acknowledge the contractual forum selection clause. And,  
 7 regardless, MCS cannot demonstrate the extraordinary circumstances required to overcome the  
 8 agreed-upon forum selection clause, necessitating dismissal of its claims.

9        *Third*, this Court lacks personal jurisdiction over each of the Shopify Defendants. There is no  
 10 general jurisdiction as neither Shopify Defendant is incorporated in or has its principal place of  
 11 business in California. *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 413–14 (2017) (paradigm fora of  
 12 general jurisdiction are “place of incorporation” and “principal place of business”); ECF 1 ¶¶ 4–6.  
 13 Likewise, MCS cannot show specific jurisdiction over the Shopify Defendants. MCS fails to allege  
 14 specific facts establishing that its negligence claim arises out of the Shopify Defendants’ purposeful  
 15 availment of the “benefits and protections” of California law. *Schwarzenegger v. Fred Martin Motor*  
 16 *Co.*, 374 F.3d 797, 801–02 (9th Cir. 2004). Since MCS cannot meet its burden to establish a *prima  
 17 facie* showing of personal jurisdiction, the Shopify Defendants should be dismissed.

18        *Fourth*, MCS does not have statutory standing to bring claims under consumer protection  
 19 laws. *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014) (plaintiff  
 20 must show that it is “within the class of plaintiffs” authorized to sue to establish statutory standing).  
 21 Although MCS purports to bring claims under the California Consumers Legal Remedies Act and  
 22 the California Consumer Records Act, only natural persons may bring claims under those statutes.  
 23 Cal. Civ. Code § 1798.84(b) (limiting standing to “customers,” which is defined to be a “natural  
 24 person”); Cal. Civ. Code § 1780(a)–(b) (limiting standing to a “consumer,” which is defined as an  
 25 “individual,” not a “limited liability company” like MCS). Because MCS is a limited liability  
 26 company and not a natural person, MCS cannot establish statutory standing and the Court should  
 27 dismiss MCS’s claims for violation of the California Consumers Legal Remedies Act and California  
 28 Consumer Records Act.

1 For these reasons and those demonstrated below, the Shopify Defendants respectfully request  
 2 that the Court dismiss MCS's Complaint with prejudice.

3 **II. ISSUES TO BE DECIDED**

4 Whether Plaintiff's Complaint should be dismissed with prejudice: (1) under the doctrine of  
 5 issue preclusion; (2) for forum non conveniens; or (3) for lack of personal jurisdiction under Fed. R.  
 6 Civ. P. 12(b)(2). If the Complaint is not dismissed for the preceding reasons, whether the Sixth and  
 7 Eighth Causes of Action in the Complaint should be dismissed with prejudice for insufficient  
 8 statutory standing pursuant to Fed. R. Civ. P. 12(b)(6).

9 **III. BACKGROUND**

10 **A. The Parties and Their Relationship**

11 Shopify Inc. provides software and infrastructure for businesses, like MCS, that allows them  
 12 to design, set up, and manage their own online stores. (McIntomny Decl. ¶ 3.) Merchants use Shopify  
 13 Inc.'s software and services to design, establish, and manage stores across multiple sales channels,  
 14 including the web, mobile applications, social media, and the merchant's physical locations. (*Id.*) In  
 15 turn, customers make purchases from merchants. (*Id.*)

16 Shopify USA provides services and support to various aspects of Shopify Inc.'s business,  
 17 such as a messaging application that Shopify Inc.'s merchants can use to improve their customer  
 18 service. (Harris-John Decl. ¶ 6.) Unlike Shopify Inc., Shopify USA does not enter into contracts or  
 19 business relationships for platform services with merchants, including MCS. (*Id.* ¶ 7.)

20 In 2015, MCS contacted Shopify Inc. about pursuing a business relationship, and eventually  
 21 transitioned its e-commerce business to Shopify Inc.'s platform. (FAC ¶ 21.) On June 1, 2017, the  
 22 parties entered into a new contract—the Plus Agreement. (McIntomny Decl. Ex. A.) [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]  
 2 [REDACTED]  
 3 In 2016, a separate entity—non-party Shopify International Limited (“Shopify  
 4 International”—entered into a contract for TaskUs to provide various services to Shopify  
 5 International. (McIntomny Decl. Ex. D.) Among other things, TaskUs agreed to provide Shopify  
 6 International with “[a] comprehensive customer support program through various channels,”  
 7 including “email, chat and phone.” (*Id.* at 28.)

8 **B. Criminal Actors Steal MCS Customer Information from TaskUs and Shopify,  
 9 Inc.**

10 In 2020, conspiring TaskUs support workers in the Philippines surreptitiously used their work  
 11 access to steal customer information from TaskUs and Shopify Inc., including information relating  
 12 to MCS’s customers (“2020 Data Theft”). (McIntomny Decl. ¶¶ 12-13.) Neither the Shopify  
 13 Defendants nor their employees were involved in any way in the theft of this customer information.  
 14 As soon as Shopify Inc. became aware of the data theft, it promptly notified its merchants, including  
 15 MCS. (Compl. ¶ 29.) And it also immediately began investigating the data theft—including the scope  
 16 and impact on affected persons. (*Id.* ¶¶ 29-30.)

17 On September 18, 2020, the Vice President and General Manager of Revenue at Shopify,  
 18 Inc., Loren Padelford, notified MCS that its online store was involved in the 2020 Data Theft. (*Id.* ¶  
 19 29.) Shopify Inc. explained to MCS that on July 16, 2020, unknown persons surreptitiously installed  
 20 a “private application” to steal information. (*Id.* ¶ 31.) Shopify Inc. continued to communicate  
 21 updates about the theft to MCS and its other merchants. (*Id.* ¶¶ 32-35.)

22 Shopify Inc. was shocked and appalled to learn about the theft and the criminal scheme  
 23 leading to it. Since it learned of the theft, Shopify Inc. has conducted its own investigation and  
 24 worked with all affected merchants, including MCS, to provide them with information that they could  
 25 use to inform any of their affected customers. And Shopify Inc. has continued to work tirelessly to  
 26 protect merchant information and to ensure the security and integrity of its platform.

27 **C. The Parties Litigated the Proper Forum for MCS’s Claims in the Central  
 28 District Case**

On September 16, 2022, MCS filed two lawsuits relating to the 2020 Data Theft in separate

1 California courts. In this case, MCS alleges that Shopify Inc. and one of its U.S. affiliates, Shopify  
 2 USA, are liable for breach of contract, negligence, and other claims arising out of the data theft.  
 3 (Compl. ¶¶ 62-92.) In the Central District Case, MCS alleged the same breach of contract and  
 4 negligence claims against Shopify Inc. and Shopify USA based on the same data theft. (Libeu Decl.  
 5 Ex. F (MCS First Amended Complaint) ¶¶ 46-55.) In addition to the same claims, the two cases  
 6 assert substantially overlapping allegations and seek substantially the same relief. (Compl. ¶¶ 29, 34-  
 7 41, 46-55, 99-103; Libeu. Decl. Ex. F ¶¶ 39, at 19-20.)

8 MCS decided to prosecute the Central District Case first. The Shopify Defendants filed a  
 9 motion to dismiss based on, among other things, the forum selection clause in the parties' Plus  
 10 Agreement. (Libeu. Decl. Ex. G.) In opposition, MCS did not dispute that the Plus Agreement is an  
 11 enforceable contract; that the Plus Agreement contains a forum selection clause requiring disputes  
 12 be brought in Ottawa, Canada; that the forum selection clause binds MCS, Shopify Inc., and Shopify  
 13 USA; and that MCS's contract and tort claims arise out of and in connection with the Plus Agreement.  
 14 (Libeu Decl. Ex. H at 4.) Instead, MCS argued only that the forum selection clause is unenforceable  
 15 because it allegedly "contravenes public policy," is "fundamentally unfair to MCS," and is  
 16 "tantamount to a pre-trial jury waiver." (*Id.* at 4-7.)

17 Judge Carter rejected MCS's unenforceability arguments and granted the Shopify  
 18 Defendants' motion to dismiss based on the forum selection clause. (Libeu Decl. Ex. K at 1-2.) As  
 19 Judge Carter reasoned, "the Plus Agreement was negotiated between two experienced business  
 20 entities, Plaintiff [MCS] and the Shopify Defendants" and "[t]he parties do not genuinely dispute the  
 21 existence of the forum selection clause in the Plus Agreement." (*Id.* at 1.) Finding "no extraordinary  
 22 circumstances that warrant overcoming this forum selection clause," Judge Carter dismissed the  
 23 claims against the Shopify Defendants with prejudice. (*Id.* at 1-2.)

24 **IV. ARGUMENT**

25 **A. Issue Preclusion Bars MCS's Claims Against the Shopify Defendants**

26 MCS's claims against the Shopify Defendants fail because of the preclusive nature of Judge  
 27 Carter's order finding the contractual forum selection clause to be enforceable. "The preclusive effect  
 28 of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880,

1 891 (2008); *see also Hydranautics v. FilmTec Corp.*, 204 F.3d 880, 885-86 (9th Cir. 2000) (holding  
2 that federal and California preclusion elements are identical). In the Ninth Circuit, the movant must  
3 show three elements to establish issue preclusion: “(1) the issue at stake must be identical to the one  
4 alleged in the prior litigation; (2) the issue must have been actually litigated by the party against  
5 whom preclusion is asserted in the prior litigation; and (3) the determination of the issue in the prior  
6 litigation must have been a critical and necessary part of the judgment in the earlier action. *Town of*  
7 *N. Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir. 1993) (cleaned up). All three elements are  
8 indisputable here, mandating dismissal of MCS’s claims against the Shopify Defendants.

1. The Court in the Central District Action Already Decided the Issue in this Case—the Enforceability and Applicability of the Forum Selection Clause

11 It is beyond genuine dispute that whether the forum selection clause in the Plus Agreement  
12 is enforceable and applies to MCS's claims against the Shopify Defendants is the identical issue  
13 already decided by Judge Carter. The Ninth Circuit analyzes four key factors in determining whether  
14 issues are identical: (1) "substantial overlap between the evidence or argument to be advanced"; (2)  
15 "application of the same rule of law as that involved in the prior proceeding; (3) overlap between  
16 "pretrial preparation and discovery" and (4) "how closely related are the claims involved in the two  
17 proceedings[.]" *Kamilche Co. v. United States*, 53 F.3d 1059, 1062 (9th Cir. 1995) (cleaned up). Each  
18 of the four factors demonstrates that the issue in this case—whether the forum selection clause in the  
19 Plus Agreement is enforceable and applies to MCS's claims against the Shopify Defendants—is the  
20 identical issue already decided by Judge Carter:

21 1) There is *complete* overlap between the evidence and argument to be advanced as to the forum  
22 selection clause. In both cases, MCS admits that the parties entered into a contract governing  
23 their business relationship. (Compl. ¶ 81 (“Plaintiffs and other Class members entered into a  
24 contract with Shopify”); Libeu Decl. Ex. F ¶ 47 (“There is a valid and enforceable contract  
25 between MCS and Shopify, Inc., namely, the Shopify Plus Agreement.”).) That contract is the  
26 Plus Agreement, which requires that [REDACTED] with

1 the contract be brought in Ontario, Canada. (McIntomny Decl.<sup>2</sup> Ex. A § 9.3.) In both cases, the  
 2 Shopify Defendants argue that the forum selection clause is enforceable and requires dismissal  
 3 of MCS's claims. (See *infra* § IV.A.2; Libeu Decl. Ex. G at 6-13 (Shopify Defendants' brief in  
 4 the Central District Case with the same evidence and argument).)

5 2) The same rule of law applies in both cases. Federal law applies to the enforcement and  
 6 interpretation of forum selection clauses in federal court. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*,  
 7 858 F.2d 509, 513 (9th Cir. 1988) ("We conclude that the federal procedural issues raised  
 8 by forum selection clauses significantly outweigh the state interests, and the federal rule  
 9 announced in *The Bremen* controls enforcement of forum clauses in diversity cases.").

10 3) There is no need for pretrial preparation and discovery to enforce the forum selection clause.

11 4) The claims in the two cases are nearly identical and are based on identical underlying facts.  
 12 (*Compare* Compl. ¶¶ 29-37 (detailing allegations relating to the 2020 Data Theft), *with* Libeu  
 13 Decl. Ex. F ¶¶ 34-43 (same).) Both assert breach of contract and negligence claims against the  
 14 Shopify Defendants. (*Compare* Compl. ¶¶ 62-92 (negligence and breach of contract claims),  
 15 *with* Libeu Decl. Ex. F ¶¶ 46-55 (same).) And both seek damages arising out of the 2020 Data  
 16 Theft, including relating to the alleged impact on MCS's product inventory. (*Compare* Compl.  
 17 ¶ 29 ("The files breached included the digital software codes or 'product keys' purchased and  
 18 inventoried by My Choice Software, amounting to approximately \$132,870,543.50."), *with*  
 19 Libeu Decl. Ex. F ¶ 39 ("files breached included the customer order records containing the  
 20 product keys purchased and inventoried by MCS to value over \$100 million.").)

21 In fact, on multiple occasions, MCS already admitted that the two cases involve the same  
 22 issues. For example, MCS filed a Notice of Related Case representing that this case and the Central  
 23 District Case: "involve[] the same parties and is based on the same or similar claims"; (ii) "arises  
 24 from the same or substantially identical transactions, incidents, or events requiring the determination  
 25 of the same or substantially identical questions of law or fact"; (iii) "involves claims against, title to,  
 26

---

27 <sup>2</sup> Due to the nearly identical underlying allegations in this case and the Central District Case, the  
 28 Shopify Defendants have re-used the same fact declarations from the Central District Case in support  
 of this Motion.

1 possession of, or damages to the same property”; and (iv) “is likely for other reasons to require  
 2 substantial duplication of judicial resources if heard by different judges.” (Libeu Decl. Ex. L (MCS’s  
 3 Notice of Related Case) at 1.) MCS further represented that its complaint in this case and in the  
 4 Central District Case “alleg[e] similar claims.” (*Id.* at 2; *see also* Ex. J at 7:20-23 (MCS admitting  
 5 that this case has “some of the same theories that are alleged [in the Central District Case”]).) Based  
 6 on this, Judge Carter found that the cases are “substantially identical.” (*Id.*, Ex. K at 1 (“the parties  
 7 have represented that a substantially identical state court action is proceeding in San Francisco” and  
 8 finding “that resolution of that San Francisco action would also resolve the instant case.”)).

9       Although MCS alleges causes of action against the Shopify Defendants in this case that it did  
 10 not allege in the Central District Case (Compl. ¶¶ 93-177 (detailing additional claims)), those are still  
 11 indisputably *related*, which is all the analysis requires. Each of those causes of action are based on  
 12 the Shopify Defendants’ alleged failures to prevent the 2020 Data Theft, the *same* asserted bases for  
 13 its claims in the Central District Case. (*E.g.*, Compl. ¶ 100 (“Shopify breached its implied contracts  
 14 with Plaintiff and the other Class Members to safeguard and protect their PII”), *id.* ¶ 108  
 15 (“Defendants’ failure to prevent, detect, and stop the Data Breach from occurring”)). Where, as here,  
 16 a plaintiff adds new claims in a second case that are based on substantially the same factual basis as  
 17 its claims in the first case, courts hold that the issues between the cases are sufficiently identical for  
 18 the preclusion analysis. *Offshore Sportswear*, 114 F.3d at 850 (affirming preclusion where plaintiff  
 19 asserted new claim of “fraudulent inducement” in second case but based on the same facts as “claim  
 20 for relief for fraud in the prior federal complaint”); *Monterey Plaza Hotel Ltd. P’ship v. Loc. 483 of*  
 21 *Hotel Emps. & Rest. Emps. Union, AFL-CIO*, 215 F.3d 923, 927-28 (9th Cir. 2000) (affirming  
 22 dismissal based on res judicata even though first case involved defamation claim and second case  
 23 involved a RICO claim because both sought recovery for “the same overall harms”).

24       There can be no genuine dispute that the specific issue here—whether the contractual forum  
 25 selection clause is enforceable and requires MCS’s claims regarding the 2020 Data Theft be brought  
 26 in Ontario, Canada—is the *same* issue that was presented to and decided by Judge Carter in the  
 27 Central District Case.

28

## 2. MCS and the Shopify Defendants Actually Litigated the Enforceability and Applicability of the Forum Selection Clause

MCS and the Shopify Defendants actually litigated the enforceability and applicability of the forum selection clause in the Central District Action. Shopify Inc. and Shopify USA moved to dismiss MCS's claims for forum non conveniens based on the forum selection clause in the Plus Agreement. (Libeu Decl. Ex. G (Shopify Defendants' motion to dismiss in the Central District Case).) MCS opposed the Shopify Defendants' motion, arguing that the forum selection is unenforceable. (Libeu Decl. Ex. H (MCS opposition to Shopify Defendants' motion to dismiss); *supra* § III.C.) The Shopify Defendants then filed a reply brief in support of its forum selection clause argument in the motion to dismiss. (Libeu Decl. Ex. I (reply brief).) The Court discussed issues relating to the motion to dismiss during hearings on May 1 and May 16, 2023. (*Id.*, Ex. K at 1.)

After this fulsome briefing by the parties and oral argument, Judge Carter found the forum selection clause in the Plus Agreement to be enforceable and dismissed Shopify Inc. and Shopify USA with prejudice from the Central District Case. (Libeu Decl. Ex. K at 2 (“Accordingly, the Court **GRANTS** Shopify Defendants’ Motion to Dismiss [] and **DISMISSES WITH PREJUDICE** this action against the Shopify Defendants.”).) Under controlling Ninth Circuit precedent, Judge Carter’s order is a final judgment with preclusive effect for at least two, independent reasons.

First, Judge Carter dismissed MCS’s claims against Shopify Inc. and Shopify USA *with prejudice*. This dismissal “with prejudice” is necessarily a final judgment with preclusive effect. Under Ninth Circuit law, “[t]he phrase ‘final judgment on the merits’ is often used interchangeably with ‘dismissal with prejudice.’” *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). Courts thus routinely use dismissals with prejudice to bar the re-litigation of the same issues in later-filed cases. *See, e.g., Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (affirming dismissal based on res judicata “because the prior action was dismissed with prejudice”); *Vawter v. Bank of Am. NA*, 108 F. Supp. 3d 719, 724 (D. Ariz. 2015) (“A dismissal with prejudice entered pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted is a ‘judgment on the merits’ to which the doctrine of claim preclusion applies.”); *In re Koebel*, 2014 WL 1654342, at \*3 (Bankr. C.D. Cal. Apr. 25, 2014) (“For claim preclusion purposes, a dismissal with

1 prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action.”  
2 (cleaned up)).

3       Second, irrespective of a “with prejudice” dismissal, the Ninth Circuit has held that a  
4 dismissal based on a forum selection clause has preclusive effect in related actions between the same  
5 parties. In *Offshore Sportswear*, for example, the plaintiff argued that a prior dismissal due to an  
6 enforceable forum selection clause was “not an adjudication on the merits[.]” 114 F.3d at 850. The  
7 Ninth Circuit rejected that argument, holding that dismissal based on a forum selection clause “is a  
8 determination on the merits of the applicability, and enforceability, of the clause itself.” *Id.* at 851.  
9 The dismissal is “is preclusive when the issues and the parties remain the same.” *Id.*

10 This case mirrors *Offshore Sportswear*. Judge Carter dismissed MCS's claims due to "the  
11 existence of the forum selection clause in the Plus Agreement." (Libeu Decl. Ex. K at 1.) He held,  
12 over MCS's objections, that the forum selection is enforceable and that it applied to MCS's claims.  
13 (*Id.*) Since the issues and parties in this case are the same as the Central District Case (*see supra*  
14 III.C), Judge Carter's dismissal precludes MCS's claims here. *Offshore Sportswear*, 114 F.3d at 851  
15 (affirming dismissal because "[plaintiff] is precluded from relitigating the applicability, and  
16 enforceability, of the forum selection clause").

### 3. The Forum Selection Clause Was Critical and Necessary to Dismissal in the Central District Case

19 As with the first two elements, there can be no dispute about the final element of issue  
20 preclusion: that “the determination of the issue in the prior litigation must have been a critical and  
21 necessary part of the judgment in the earlier action.” *Offshore Sportswear*, 114 F.3d at 850 (cleaned  
22 up). Judge Carter’s order dismissed Shopify Inc. and Shopify USA for a single reason: due to “the  
23 forum selection clause in the Plus Agreement.” (Libeu Decl. Ex. K at 1.) *Offshore Sportswear*, 114  
24 F.3d at 851 (affirming preclusion where forum selection clause “is the issue that was critical to  
25 dismissal of the original action”). Accordingly, Judge Carter’s ruling that the forum selection clause  
26 is enforceable and applies to MCS’s claims binds MCS here.

\* \* \*

28 MCS and the Shopify Defendants already litigated the applicability and enforceability of the

1 forum selection clause in the Plus Agreement to MCS's claims relating to the 2020 Data Theft. After  
 2 reviewing the parties' briefing, Judge Carter found the forum selection clause to be enforceable and  
 3 dismissed the Shopify Defendants with prejudice. This Court need not repeat Judge Carter's  
 4 analysis—it should instead dismiss MCS's claim in this case based on the preclusive effect of the  
 5 dismissal in the Central District Case. If it does, it need not reach any further issues presented in this  
 6 Motion. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) ("judicial  
 7 economy" best served where court can dismiss based on forum selection clause without reaching  
 8 other jurisdictional issues, including personal jurisdiction).

9       Additionally, due to the clear preclusive effect of Judge Carter's order, the Court should issue  
 10 an order to show cause for why MCS and its attorneys should not be sanctioned for their unexplained  
 11 refusal to dismiss claims against the Shopify Defendants in this case. *See, e.g., Vigil v. Walt Disney*  
 12 *Co.*, 2003 WL 22016805, at \*6 (N.D. Cal. July 31, 2003) (ordering plaintiff to "show cause [for]  
 13 why he should not be sanctioned" for "proceeding to relitigate claims already decided" and noting  
 14 "[s]anctions may be imposed against a party and its attorneys pursuant to Federal Rule of Civil  
 15 Procedure 11 on the court's own initiative").

16       **B.      MCS Agreed to a Forum Selection Clause Mandating that All Disputes Be Heard  
 17                   in Ontario Canada**

18       Even if issue preclusion did not apply, the Court should dismiss Shopify Inc. and Shopify  
 19 USA due to the enforceable forum selection clause in the Plus Agreement.

20       Dismissal is appropriate on forum non conveniens grounds when there is a forum selection  
 21 clause mandating that the claims be litigated in another forum. *See Atl. Marine*, 571 U.S. at 60-62  
 22 (2013) ("[T]he appropriate way to enforce a forum-selection clause pointing to a state or foreign  
 23 forum is through the doctrine of forum non conveniens."). Here, MCS and Shopify Inc. agreed to  
 24 litigate all disputes relating to their business relationship in Ontario, Canada. Accordingly, the Court  
 25 should dismiss all of MCS's claims against the Shopify Defendants as they are not properly brought  
 in California.

26       1.      The Forum Selection Clause Applies to the Claims Against the Shopify  
 27                   Defendants

28       In determining whether to dismiss a case in favor of a different forum, "the Court must first

1 determine whether a valid forum-selection clause exists within the [parties'] contract." *Moretti v.*  
 2 *Hertz Corp.*, 2014 WL 1410432, at \*2 (N.D. Cal. Apr. 11, 2014). "Determining this contractual issue  
 3 is a two-part inquiry: (1) if the parties agreed to the clause; and (2) if the clause applies to the issue  
 4 in dispute." *Id.*; *Manetti-Farrow*, 858 F.2d at 513–15 (affirming dismissal after finding that the  
 5 parties agreed to a forum selection clause that applied to the dispute). Both parts of the inquiry are  
 6 satisfied in this case.

7 *First*, MCS and Shopify Inc. agreed to a forum selection clause in the Plus Agreement. The  
 8 Plus Agreement unquestionably governs the commercial relationship between MCS and the Shopify  
 9 Defendants. (McIntomny Decl. Ex. A § 2.1 [REDACTED])

10 [REDACTED] Section 9.3 of the contract contains  
 11 a forum selection clause: [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED] (*Id.* § 9.3.) The forum selection clause is "prima facie valid"  
 14 and enforceable. *Manetti-Farrow*, 858 F.2d at 514–15.

15 Although not a signatory to the Plus Agreement, Shopify USA can also enforce the forum  
 16 selection clause. "In the Ninth Circuit, 'where the alleged conduct of the nonparties is closely related  
 17 to the contractual relationship, a range of transaction participants, parties and non-parties, should  
 18 benefit from and be subject to forum selection clause.'" *McNally v. Kingdom Tr. Co.*, 2020 WL  
 19 7786539, at \*2 (C.D. Cal. Nov. 13, 2020) (cleaned up); *In re Yahoo! Inc. Customer Data Sec. Breach*  
 20 *Litig.*, 2017 WL 3727318, at \*49–52 (N.D. Cal. Aug. 30, 2017) (non-party can enforce forum  
 21 selection clause where negligence claim related to contract).

22 Shopify USA is a wholly-owned subsidiary of Shopify Inc. (McIntomny Decl. ¶ 6.) MCS  
 23 alleges that Shopify USA is liable for the same reasons as Shopify Inc.—even grouping them together  
 24 as "Shopify" or "Defendants" for all of its claims. (Compl. ¶¶ 64-177.) According to its terms, the  
 25 Plus Agreement governs MCS's commercial relationship for all Shopify Services. (McIntomny Decl.  
 26 Ex. A § 3.1.) The non-signatory Shopify Inc. subsidiary can thus enforce the contract's forum  
 27 selection clause. *See, e.g.*, *Manetti-Farrow*, 858 F.2d at 514 n.5 ("forum selection clause applies to  
 28 all defendants" even though only one defendant signed the contract because "the alleged conduct of

1 the non-parties is so closely related to the contractual relationship"); *Stavriniades v. Vin Di Bona*, 2018  
 2 WL 317821, at \*3-4 (N.D. Cal. Jan. 8, 2018) (holding that party was "bound by the forum selection  
 3 clause" even though he "was not party to the contracts nor their terms" because "the alleged conduct  
 4 of the non-parties is so closely related to the contractual relationship" (cleaned up)).

5 *Second*, the forum selection clause in the Plus Agreement applies to MCS's claims. MCS's  
 6 breach of contract claim alleges "Plaintiffs and the other Class members entered into a contract [or  
 7 the Plus Agreement] with Shopify"<sup>3</sup> which included "Shopify's Privacy Policy [which] is an  
 8 agreement between Shopify and individuals who provided their PII to Shopify." (Compl. ¶¶ 81-83.)  
 9 MCS further alleges that "Shopify's Privacy Policy 'governs [Shopify's] use of the information  
 10 [customers] provide us,'" and applies to MCS's claims against the Shopify Defendants. (*Id.* ¶ 84.)  
 11 The Ninth Circuit routinely affirms dismissal of breach of contract claims to ensure that the claim is  
 12 litigated in the agreed-upon forum in the contract. *See, e.g., Finsa Portafolios, S.A. DE C.V. v.*  
 13 *OpenGate Cap., LLC*, 769 F. App'x 429, 431–32 (9th Cir. 2019) (affirming dismissal of breach of  
 14 contract claim based on forum non conveniens and forum selection clause); *Adema Techs., Inc. v.*  
 15 *Wacker Chem. Corp.*, 657 F. App'x 661, 663–64 (9th Cir. 2016) (same).

16 The forum selection clause likewise applies to MCS's tort claims. It is black-letter law that  
 17 "forum selection clauses can be equally applicable to contractual and tort causes of action." *Manetti-*  
 18 *Farrow*, 858 F.2d at 514. Where a forum selection clause covers any claim "in connection with," or  
 19 "relating to" the contract, the clause "appl[ies] to any disputes that reference the agreement or have  
 20 some 'logical or causal connection' to the agreement." *Yei A. Sun v. Advanced China Healthcare,*  
 21 *Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018). "The dispute need not grow out of the contract or require  
 22 interpretation of the contract in order to relate to the contract." *Id.* at 1086.

23 Here, the scope of the Plus Agreement and the forum selection clause are broad. As noted  
 24 above, the Plus Agreement governs all services Shopify Inc. provides to MCS. (McIntomny Decl.  
 25 Ex. A § 3.1.) The forum selection clause covers all claims [REDACTED] with the

27 <sup>3</sup> MCS's complaint states this contract was "for the provision of title insurance, a home warranty, or  
 28 other closing services." (Compl. ¶ 81.) This is plainly wrong, and the Shopify Defendants presume  
 such language was included unintentionally.

1 contract. (*Id.* § 9.3.) The clause applies to all of MCS’s claims because there is a “logical or causal  
 2 connection” between the claims and the contract. *Yei A. Sun*, 901 F.3d at 1086.

3 All of MCS’s claims reference “Shopify” or “Defendants” and their collection of MCS and  
 4 putative class members’ personal identifiable information.<sup>4</sup> (Compl. ¶¶ 64, 95, 104, 116, 142, 154,  
 5 169.) But MCS also admits that any duties Shopify Inc. (and thus, its “functional equivalents”) owes  
 6 are outlined in the Plus Agreement. (*Id.* ¶¶ 81-83.) MCS agreed that it [REDACTED]

7 [REDACTED]  
 8 [REDACTED] (McIntomny  
 9 Decl. Ex. A § 3.1 (emphasis added).) And the parties agreed that [REDACTED]  
 10 [REDACTED]

11 [REDACTED] (*Id.* Ex. B § 21.) The duties that MCS claims  
 12 the Shopify Defendants owe are thus detailed in and circumscribed by the Plus Agreement, including  
 13 the policies incorporated therein.

14 Where, as here, a parties’ contract contains provisions that relate to or could affect the  
 15 plaintiff’s tort claim, courts routinely enforce the forum selection clauses in those contracts. *See, e.g.*,  
 16 *Yei A. Sun*, 901 F.3d at 1086–87 (affirming enforcement of forum selection clause in a share purchase  
 17 agreement where plaintiff alleged that defendant was liable for a tort as a “seller of securities”); *Color*  
 18 *Switch LLC v. Fortafy Games DMCC*, 818 F. App’x 694, 696 (9th Cir. 2020) (holding that tort claim  
 19 fell “within the scope of the forum selection clause” because “[a] court would have to interpret []  
 20 ownership rights under the agreement to resolve [dispute]”). In sum, the Plus Agreement requires  
 21 that MCS’s claims must be brought, if at all, in Ontario, Canada.

22 2. MCS Cannot Show the Extraordinary Circumstances Required to Overcome  
 23 Application of the Forum Selection Clause

24 Once the district court finds a forum selection clause in the parties’ contract, “the plaintiff  
 25 ‘must bear the burden of showing why the court should not transfer the case to the forum to which

26 \_\_\_\_\_  
 27 <sup>4</sup> To be clear, MCS does not assert any facts supporting its conclusory assertion that its or its  
 28 customers’ “personal identifiable information” was stolen. The only specific facts MCS alleges about  
 harm relate to alleged stolen product keys, which of course would not apply to any other non-software  
 licensing business or consumer. (Compl. ¶ 29.)

1 the parties agreed.”” *Yei A. Sun*, 901 F.3d at 1087 (quoting *Alt. Marine*, 571 U.S. at 64). Importantly,  
 2 “[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected  
 3 forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the  
 4 litigation.” *Alt. Marine*, 571 U.S. at 64. For that reason, the plaintiff cannot prevail by pointing to  
 5 any private factors to defeat application of the forum selection clause. *Yei A. Sun*, 901 F.3d at 1087–  
 6 88 (“[A] court must deem all factors relating to the private interests of the parties . . . entirely in favor  
 7 of the preselected forum.” (cleaned up)). Instead, the plaintiff must show that “public-interest factors  
 8 overwhelmingly disfavor a transfer.” *Alt. Marine*, 571 U.S. at 67. “In short, ‘only under  
 9 **extraordinary circumstances** unrelated to the convenience of the parties’ should a motion to enforce  
 10 a forum-selection clause be denied.” *Yei A. Sun*, 901 F.3d at 1088 (quoting *Alt. Marine*, 571 U.S. at  
 11 62) (emphasis added). “The practical result is that a forum-selection clause ‘should control except in  
 12 unusual cases.’” *Id.* (quoting *Alt. Marine*, 571 U.S. at 64).

13       Under Ninth Circuit precedent, “a forum-selection clause [is] controlling unless the plaintiff  
 14 made a strong showing” on one of three factors: “(1) the clause is invalid due to ‘fraud or  
 15 overreaching,’ (2) ‘enforcement would contravene a strong public policy of the forum in which suit  
 16 is brought, whether declared by statute or by judicial decision,’ or (3) ‘trial in the contractual forum  
 17 will be so gravely difficult and inconvenient that [the litigant] will for all practical purposes be  
 18 deprived of his day in court.’” *Id.* (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15  
 19 (1972)).

20       MCS cannot show extraordinary circumstances to overcome the forum selection clause.  
 21 There is no allegation or evidence in the Complaint that the forum selection clause is invalid, that  
 22 enforcement would contravene a strong public policy of California, or that trial in the contractual  
 23 forum—Ontario, Canada—would be gravely difficult and inconvenient.

24       Moreover, it is beyond reasonable dispute that Ontario, Canada is an adequate forum. Among  
 25 other things, Ontario law recognizes negligence and breach of contract causes of actions. (Kolers  
 26 Decl. ¶¶ 7–9.) And putting aside the merits of MCS’s claims, there is no Ontario statute or common  
 27 law doctrine that would preclude MCS from having brought this case in Ontario. (*Id.* ¶ 11.) Indeed,  
 28 courts routinely dismiss actions in favor of forum selection clauses mandating that disputes be

1 brought in Canada. *See, e.g., Juniper Networks, Inc. v. Andrade*, 2021 WL 3514103, at \*4 (N.D. Cal.  
 2 Aug. 10, 2021) (dismissing claims due to forum selection clause requiring disputes be brought in  
 3 Ontario, Canada and holding that “[s]everal district courts within the Ninth Circuit have found that  
 4 the Canadian judicial system provides an adequate alternative forum”); *Modius, Inc. v. Psinaptic, Inc.*,  
 5 2006 WL 1156390, at \*7-8 (N.D. Cal. May 2, 2006) (dismissing claims due to forum selection  
 6 clause requiring claims be brought “before the Court of Queen’s Bench, City of Calgary, Alberta,  
 7 Canada”)

8 Since the forum selection clause mandates that disputes be brought in Canada and MCS  
 9 cannot meet its burden to show extraordinary circumstances to set aside the parties’ chosen forum,  
 10 the Court should dismiss MCS’s claims.

11 **C. This Court Does Not Have Personal Jurisdiction Over the Shopify Defendants**

12 “[T]he plaintiff bears the burden of establishing that jurisdiction is proper.” *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). “There are two forms of personal jurisdiction that a  
 13 forum state may exercise over a nonresident defendant—general jurisdiction and specific  
 14 jurisdiction.” *Id.* at 1016. MCS appears to allege both, but it cannot make a *prima facie* case to  
 15 establish either for either of the Shopify Defendants.  
 16

17 1. There is No General Jurisdiction Over the Shopify Defendants

18 “The ‘paradigm’ forums in which a corporate defendant is ‘at home,’ [] are the corporation’s  
 19 place of incorporation and its principal place of business.” *BNSF*, 581 U.S. at 413. Only in an  
 20 “exceptional case” may “a corporate defendant’s operations in another forum [] be so substantial and  
 21 of such a nature as to render the corporation at home in that State.” *Id.* (cleaned up). “This is an  
 22 exacting standard” that requires sufficient contacts to “‘approximate physical presence’ in the forum  
 23 state.” *Schwarzenegger*, 374 F.3d at 801 (cleaned up).

24 The Shopify Defendants are not “at home” in California. Shopify Inc. is incorporated in  
 25 Canada. (McIntomny Decl. ¶ 2.) Shopify USA is incorporated in Delaware. (Harris-John Decl. ¶ 2.)  
 26 Neither has a principal place of business in California. (McIntomny Decl. ¶ 2; Harris-John Decl. ¶  
 27 3.)

28 In the Complaint, MCS alleges that “Shopify regularly conducts and/or solicits business in,

1 engages in other persistent courses of conduct in, and/or derives substantial revenue from products  
 2 provided to persons in the State of California” and “has engaged, and continues to engage, in  
 3 substantial and continuous business practices in the State of California.” (Compl. ¶ 17.) MCS’s lone  
 4 allegation supporting this conclusion is Shopify Inc. and Shopify USA have “a domestic office in  
 5 San Francisco, California.” (*Id.* ¶¶ 10-11.) But even treated as true, this allegation is insufficient, as  
 6 a brick-and-mortar location is not “so continuous and systemic” as to render the Shopify Defendants  
 7 “essentially at home in California.” *Garcia v. NutriBullet, L.L.C.*, 2022 WL 3574699, at \*2 (C.D.  
 8 Cal. July 14, 2022) (no general jurisdiction where defendant maintained brick and mortar stores and  
 9 fulfillment centers in California) (emphasis in original); *LaGuardia v. Designer Brands, Inc.*, 2020  
 10 WL 2463385, at \*4 (S.D. Cal. May 7, 2020) (no general jurisdiction even with 48 brick and mortar  
 11 locations in California). And the Supreme Court has squarely “refused to approve the exercise of  
 12 general jurisdiction in every State in which a corporation engages in a substantial, continuous, and  
 13 systematic course of business.” *HID Glob. Corp. v. Isonas, Inc.*, 2014 WL 10988340, at \*3 (C.D.  
 14 Cal. Apr. 21, 2014) (cleaned up) (citing *Daimler AG v. Bauman*, 571 U.S. 117, 138 (2014)).  
 15 Accordingly, MCS’s allegations are deficient as a matter of law.

16 The reality is that MCS cannot plead sufficient systematic contacts to approximate physical  
 17 presence in California for any of the Shopify Defendants:

- 18 • Shopify Inc. is not registered to do business in California, does not have a registered agent  
 19 for service of process in California, does not have an office in California, and has no  
 20 employees in California. (McIntomny Decl. ¶ 4.) *Best Odds Corp. v. iBus Media Ltd.*, 655 F.  
 21 App’x 582, 583 (9th Cir. 2016) (no general jurisdiction on similar facts); *Mehr v. Fed’n  
 22 Internationale de Football Ass’n*, 115 F. Supp. 3d 1035, 1054 (N.D. Cal. 2015) (same).
- 23 • Shopify USA’s principal address is currently in New York and its senior-most executive  
 24 primarily conducts his work for Shopify USA from New York. (Harris-John Decl. ¶ 3.) Prior  
 25 to December 22, 2020, Shopify USA’s officers were located in Canada. (*Id.* ¶ 4.) *Ranza v.  
 26 Nike, Inc.*, 793 F.3d 1059, 1070 (9th Cir. 2015) (district court must focus on where  
 27 corporation has “extensive contacts,” not simply where it conducts “business activity”).

28 In sum, MCS failed to meet its burden to plead sufficient facts to show a *prima facie* basis

1 for general jurisdiction over the Shopify Defendants.

2. There Is No Specific Jurisdiction Over the Shopify Defendants

3 As for specific jurisdiction, MCS must show “minimum contacts” with California.  
4 *Schwarzenegger*, 374 F.3d at 801–02. The Ninth Circuit employs “a three-prong test for analyzing a  
5 claim of specific personal jurisdiction:

- 6 (1) The non-resident defendant must purposefully direct his activities or consummate some  
7 transaction with the forum or resident thereof; or perform some act by which he purposefully  
8 avails himself of the privilege of conducting activities in the forum, thereby invoking the  
9 benefits and protections of its laws;
- 10 (2) the claim must be one which arises out of or relates to the defendant’s forum-related  
11 activities; and
- 12 (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e., it must  
13 be reasonable. *Id.*

14 “The plaintiff bears the burden of satisfying the first two prongs of the test.” *Id.* “If the  
15 plaintiff fails to satisfy either of these prongs, personal jurisdiction is not established in the forum  
16 state.” *Id.* “If the plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts  
17 to the defendant to ‘present a compelling case’ that the exercise of jurisdiction would not be  
18 reasonable.” *Id.* (internal citations omitted). Here, MCS has not satisfied either of the first two prongs,  
19 and exercising jurisdiction over the Shopify Defendants would be unreasonable.

20 *First*, MCS cannot establish purposeful availment. The Ninth Circuit applies the purposeful  
21 availment framework, rather than an “effects” test or purposeful direction, when addressing contract  
22 and tort claims like MCS’s claims here. *Holland Am. Line Inc. v. Wartsila N. Am., Inc.*, 485 F. 3d  
23 450, 460 (9th Cir. 2007) (“effects” test “applies only to intentional torts, not to the breach of contract  
24 and negligence claims presented here”). To establish purposeful availment, MCS must show that  
25 each Shopify Defendant “performed some type of affirmative conduct which allows or promotes the  
26 transaction of business within the forum state.” *Picot v. Weston*, 780 F.3d 1206, 1212 (9th Cir. 2015);  
27 *see also Schwarzenegger*, 374 F.3d at 802 (purposeful availment consists of actions that invoke the  
28 “benefits and protections” of the laws of the forum).

29 MCS broadly alleges that “[t]he injuries, damages and/or harm upon which this action is  
30 based occurred or arose out of activities engaged in by Shopify within, affecting, and emanating from  
31 the State of California.” (Complaint ¶ 17.) But what activities, the Complaint does not even attempt

1 to say. This is nothing more than a conclusory allegation devoid of any detail that cannot establish  
 2 personal jurisdiction. *See Butcher's Union Loc. No. 498, United Food & Com. Workers v. SDC Inv.,*  
 3 *Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) ("nonspecific conclusory statement is not enough to show []  
 4 minimum contacts").

5 Further, MCS cannot establish purposeful availment by pointing to Shopify Inc.'s alleged  
 6 business with MCS. As the Supreme Court has held, simply entering into a contract with a California  
 7 company does not establish minimum contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478–  
 8 79 (1985) ("[A] contract is ordinarily but an intermediate step serving to tie up prior business  
 9 negotiations with future consequences which themselves are the real object of the business  
 10 transaction." (cleaned up)). *Boschetto*, 539 F.3d at 1017 ("[W]e are guided by the Supreme Court's  
 11 admonition that the formation of a contract with a nonresident defendant is not, standing alone,  
 12 sufficient to create jurisdiction."). Instead, other "factors—prior negotiations and contemplated  
 13 future consequences, along with the terms of the contract and the parties' actual course of dealing—  
 14 [] must be evaluated in determining whether the defendant purposefully established minimum  
 15 contacts within the forum." *Burger King*, 471 U.S. at 479.

16 Here, the agreed terms of the Plus Agreement defeat any claim that Shopify Inc. established  
 17 minimum contacts with California. Despite entering into a contract with a California company,  
 18 Shopify Inc. agreed with MCS to [REDACTED] over all disputes elsewhere, in Ontario,  
 19 Canada. (McIntomny Decl. Ex. A § 9.3.) And the parties further agreed that the Plus Agreement  
 20 would be [REDACTED]

21 [REDACTED] not California law. (*Id.*) The Plus Agreement thus proves that Shopify Inc.  
 22 deliberately did not purposefully avail itself of the protections and benefits of California. *Skanda*  
 23 *Grp. of Indus., LLC v. Cap. Health Partner, LLC*, 2020 WL 7630687, at \*5 (C.D. Cal. Dec. 21, 2020)  
 24 (no purposeful availment where contract "does not include a California choice of law provision").  
 25 To the contrary, it agreed with MCS that the parties should instead enjoy the benefits of a Canadian  
 26 forum and Canadian law. *See, e.g., Levine Leichtman Cap. Partners III v. Shaker Constr. Grp.*, 2008  
 27 WL 11336663, at \*4 (C.D. Cal. May 2, 2008) ("The choice of law clauses in the contracts provide  
 28 further reason to find that purposeful availment [in California] has not been satisfied . . . [because

1 the] various contracts were governed by either Mississippi or New York choice of law clauses.”).

2 Shopify USA has likewise not purposefully availed itself of the protections of the California  
 3 forum. Shopify USA provides services to Shopify Inc., a Canadian company—it does not itself  
 4 directly provide services to MCS in California or elsewhere. (Harris-John Decl. ¶¶ 6-7.) Courts  
 5 decline to find specific jurisdiction under such circumstances. *See Caces-Tiamson v. Equifax*, 2020  
 6 WL 1322889, at \*3 (N.D. Cal. Mar. 20, 2020) (“[Plaintiff] cannot establish even a *prima facie* case  
 7 of specific jurisdiction because . . . any and all actions which [defendant] did or allegedly did not  
 8 take with respect to its data security systems would presumably have occurred in Georgia, where  
 9 [defendant] has its principal place of business.” (cleaned up)).

10 *Second*, MCS’s claims also do not “arise out of” the Shopify Defendants’ California  
 11 activities. To meet this element, a defendant’s relationship with the forum must “arise out of contacts  
 12 that the ‘defendant *himself*’ creates with the forum State.” *Walden v. Fiore*, 571 U.S. 277, 284 (2014)  
 13 (emphasis in original). As an initial matter, MCS fails to assert any *specific* allegations against each  
 14 of Shopify Inc. and Shopify USA, which is plainly deficient under Supreme Court precedent. *See*  
 15 *Rush v. Savchuk*, 444 U.S. 320, 331-33 (1980) (reversing finding of personal jurisdiction where  
 16 district court “consider[ed] the ‘defending parties’ together and aggregat[ed] their forum contacts in  
 17 determining whether it had jurisdiction”).

18 Instead, MCS alleges generally that the Shopify Defendants “breached their duty to exercise  
 19 reasonable care in safeguarding and protecting Plaintiff’s and the other Class Members’ PII” and  
 20 “failed to perform its obligations under the contract, including failing to provide adequate privacy,  
 21 security, and confidentiality safeguards for Plaintiff’s and the other Class Members’ information and  
 22 documents.” (Compl. ¶¶ 70, 89.) But there is no allegation that the Shopify Defendants breached  
 23 their duties, failed to perform, or committed any other act that allegedly caused MCS harm *in*  
 24 *California*. And there is similarly no allegation or evidence that the Shopify Defendants’ relationship  
 25 with TaskUs, a Delaware and Texas citizen (*id.* ¶ 13), has any connection *to California*. Since the  
 26 alleged violation relates to activities outside of California, MCS cannot establish specific jurisdiction  
 27 by pointing to alleged activities in California that are unrelated to MCS’s claims. *See, e.g.*, *Caces-*  
 28 *Tiamson*, 2020 WL 1322889, at \*4 (no personal jurisdiction because “there is nothing to indicate that

1 [] failure to respond . . . occurred in California, rather than Georgia”).

2 *Third*, exercising personal jurisdiction over the Shopify Defendants would offend due  
 3 process. The Ninth Circuit instructs district courts to examine seven factors in determining whether  
 4 exercising specific personal jurisdiction over non-resident defendants is reasonable. *Amoco Egypt*  
 5 *Oil Co. v. Leonis Nav. Co.*, 1 F.3d 848, 851–52 (9th Cir. 1993) (listing factors). The seven factors  
 6 present a compelling case that exercising jurisdiction would be unreasonable.

7 (i) Extent of Purposeful Interjection. As discussed above, none of the Shopify Defendants’  
 8 alleged infractions arise out of California-related activity. Because the only contact alleged here—  
 9 Shopify Inc.’s contract with MCS—is “attenuated” to the location of asserted negligent acts, this  
 10 factor “weighs in [the Shopify Defendants’] favor.” *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d  
 11 1482, 1488 (9th Cir. 1993).

12 (ii) Burden on Defendant. None of the Shopify Defendants are incorporated in or based out  
 13 of California (*see supra* § IV.C.1), and so witnesses and evidence are likely to be located outside  
 14 California. *Amoco*, 1 F.3d at 852 (factor favors defendant where “[p]otential witnesses and evidence  
 15 are not located in [the forum]”). Plus, Shopify Inc.—the entity with whom MCS contracted—is a  
 16 Canadian corporation. (*See supra* § IV.C.1.) “The unique burdens placed upon one who must defend  
 17 oneself in a foreign legal system should have significant weight in assessing the reasonableness of  
 18 stretching the long arm of personal jurisdiction over national borders.” *Amoco*, 1 F.3d at 852 (quoting  
 19 *Asahi Metal Indus. Co. v. Super. Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 107 (1987)). This factor  
 20 weighs in favor of the Shopify Defendants.

21 (iii) Conflict with the Sovereignty of Defendant’s State. “Where, as here, [Shopify Inc.] is  
 22 from a foreign nation rather than another state, the sovereignty barrier is high and undermines the  
 23 reasonableness of personal jurisdiction.” *Amoco*, 1 F.3d at 852. This factor thus also weighs in the  
 24 Shopify Defendants’ favor.

25 (iv) Forum State’s Interest. California has no greater interest in this case than Canada (where  
 26 Shopify Inc. is based and incorporated, and where the parties agreed to resolve their dispute);  
 27 Delaware (where Shopify USA is incorporated); and New York (principal place of business for  
 28 Shopify USA). (*See supra* § IV.C.1.) This factor is, at best for MCS, neutral.

1 (v) Most Efficient Resolution. There is no basis to conclude that California is a better forum  
 2 to achieve an efficient resolution than Canada, Delaware, or New York. This factor is also neutral.

3 (vi) Convenient and Effective Relief for Plaintiff. MCS agreed to a choice of law provision  
 4 in the Plus Agreement that requires that the [REDACTED]

5 [REDACTED]  
 6 [REDACTED] (McIntomny Decl. Ex. A § 9.3.) Since this case  
 7 will involve applying Canadian law to interpret the parties' duties under and representations in the  
 8 Plus Agreement, it will be more effective for MCS to litigate its claims in Canada with Canadian  
 9 attorneys skilled in Canadian law. *Alternate Health USA Inc. v. Edalat*, 2022 WL 767573, at \*10  
 10 (C.D. Cal. Mar. 14, 2022) (“applying Canadian law would still impose a substantial burden on both  
 11 the Court and the jurors, to research, understand, and apply the foreign law” (cleaned up)). This factor  
 12 weighs in the Shopify Defendants’ favor.

13 (vii) Existence of Alternative Forum. “[Plaintiff] has the burden of proving the unavailability  
 14 of an alternative forum.” *Amoco*, 1 F.3d at 853. Here, Canada is an adequate alternate forum that  
 15 recognizes MCS’s contract and negligence claims and would permit MCS to file its claims. (Kolers  
 16 Decl. ¶ 7.) This factor favors the Shopify Defendants. *Juniper*, 2021 WL 3514103, at \*4 (citing cases  
 17 holding that Canada is an “adequate alternative forum”).

18 Exercising personal jurisdiction thus offends due process and is unreasonable. *Core-Vent*, 11  
 19 F.3d at 1490 (no personal jurisdiction where “the exercise of jurisdiction would not comport with  
 20 fair play and substantial justice and would thus be unreasonable”). Accordingly, the Court should  
 21 dismiss the Shopify Defendants from this case.

22 **D. MCS Lacks Statutory Standing to Bring Consumer Claims**

23 MCS lacks statutory standing to bring claims under the California Consumers Legal  
 24 Remedies Act (“CLRA”) (Compl. ¶¶ 134-150); and the California Consumer Records Act (“CRA”)  
 25 (*id.* ¶¶ 162-177). A plaintiff must establish statutory standing to allege a plausible claim. *See*  
 26 *Lexmark*, 572 U.S. at 128 (must establish statutory standing to show that plaintiff “has a cause of  
 27 action under the statute”). To do so, the plaintiff must show it is “within the class of plaintiffs whom  
 28 [the legislature] has authorized to sue.” *Id.* at 125-26. Where a plaintiff fails to establish statutory

1 standing, courts dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).  
 2 *Piper v. Cabillo*, 2014 WL 12631475, at \*2 (N.D. Cal. Sept. 2, 2014) (“A dismissal for lack of  
 3 statutory standing is properly viewed as a dismissal for failure to state a claim.” (cleaned up)).

4 Here, MCS cannot establish standing under the CRA and CLRA because it is a limited  
 5 liability company, not an individual customer or consumer (Compl. ¶ 9 (admitting MCS is a  
 6 “California Limited Liability Company”). Under the plain language of the CRA, only a “customer”  
 7 may “institute a civil action to recover damages.” Cal. Civ. Code § 1798.84(b). The CRA defines a  
 8 “customer” as an “individual,” which is in turn defined as a “natural person.” *Id.* § 1798.80(c)-(d).  
 9 Similarly, the CLRA limits standing for a private action to a “consumer” (Cal. Civ. Code § 1780(a)-  
 10 (b)), which is defined as an “individual” (*id.* § 1761.).

11 Accordingly, MCS does not have statutory standing to bring claims under the CRA or CLRA.  
 12 *See Cumis Ins. Soc'y, Inc. v. Merrick Bank Corp.*, 2008 WL 215844, at \*5 (D. Ariz. Jan. 22, 2008)  
 13 (no standing to bring claim under 1798.80(c) because statute “limits the relief to customers” and  
 14 plaintiff is a “corporation”); *Dipito LLC v. Manheim Inv., Inc.*, 2021 WL 5908994, at \*15 (S.D. Cal.  
 15 Dec. 14, 2021) (dismissing CLRA claim because plaintiff “is a business,” “not a consumer”).  
 16 Because statutory standing is required, the CRA and CLRA claims must be dismissed. *See Muddy  
 17 Waters, LLC v. Super. Ct.*, 62 Cal. App. 5th 905, 922-23 (2021) (“The standing requirement is a  
 18 necessary prerequisite for a private party to bring a successful [] claim. Absent evidence to suggest  
 19 it has standing, plaintiff has not established a probability of prevailing on this cause of action.”).

20 **V. CONCLUSION**

21 MCS should have never brought these claims in California, let alone in two different fora.  
 22 And MCS should have immediately dismissed its claims against Shopify Inc. and Shopify USA once  
 23 Judge Carter issued his ruling enforcing the forum selection clause in the Plus Agreement. MCS’s  
 24 failure to do so requires this Court and the Shopify Defendants to waste time and resources litigating  
 25 issues that have already been decided. The Shopify Defendants respectfully request that the Court  
 26 put an end to MCS’s wasteful and unnecessary gamesmanship by dismissing its claims against the  
 27 Shopify Defendants with prejudice.

28

1 Dated: June 7, 2023

**HUESTON HENNIGAN LLP**

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By:



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